

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

FUTUREWISE, GOVERNORS POINT
DEVELOPMENT COMPANY, TRIPLE R.
RESIDENTIAL CONSTRUCTION, INC. AND
THE SAHLIN FAMILY, ERIC HIRST, LAURA
LEIGH BRAKKE, WENDY HARRIS AND
DAVID STALHEIM, AND CITY OF
BELLINGHAM,

Petitioners,

v.

WHATCOM COUNTY,

Respondent

FORT HILL, ET AL., BOULOS, ET AL, AND
DOUGLAS PULLAR,

Intervenors.

Case Nos. 11-2-0010c and 05-2-0013

**ORDER FINDING CONTINUING
NONCOMPLIANCE, EXTENDING
INVALIDITY, AND GRANTING STAY OF
COMPLIANCE SCHEDULE
[Re: LAMIRD DRs and LAMIRD LOBs]**

This matter came before the Board upon a joint motion for stay of compliance proceedings filed by Respondent Whatcom County and Intervenors Boulos, et al. and Douglas Pullar. The Board's Compliance Order for Case Nos. 11-2-0010c and 05-2-0013, issued on January 4, 2013, found continuing noncompliance for some aspects of the County's comprehensive plan and remanded the plan to the County.¹ The County timely enacted certain comprehensive plan and zoning code amendments but declined to amend (a) noncompliant LAMIRD development regulations (LAMIRD DRs)² and (b) noncompliant

¹ Case Nos. 11-2-0010c and 05-2-0013, Compliance Order and Order Following Remand on Issue of LAMIRDs (January 4, 2013).

² Identified in the current Compliance Briefs and Proceedings as Legal Issue 5 – Type I, II and III LAMIRDs "Exemptions" and "Small Scale Standards."

1 LAMIRD boundaries for the Smith/Guide Meridian and Birch Bay/Lynden & Valley View
2 LAMIRDs (LAMIRD LOBs).³ The request for stay is based on the pendency of superior
3 court appeals on these issues.

4 In considering the motions, the Board had before it:

- 5 • Joint Motion Requesting a Stay of Compliance Proceedings on Issues Raised in
6 Petitions for Review, filed October 15, 2013, by Whatcom County and Intervenor
7 Marco Boulos, et al. and Douglas Pullar.
- 8 • Hirst, et al.'s Opposition to Joint Motion Requesting a Stay of Compliance
9 Proceedings on Issues Raised in Petitions for Review, filed October 21, 2013, by
10 Petitioners Hirst, et al.

11 The Board heard argument from the parties at the beginning of a Compliance
12 Hearing held November 1, 2013. As to the three issues raised in the joint motion for a stay,
13 the County conceded it did not take action to comply with the Board's January 4, 2013,
14 Compliance Order. Petitioners argued that because the County has the burden to act, but it
15 did not, it should not be granted a stay and should be required to comply with the Board's
16 January 4, 2013, Compliance Order. Following Board panel deliberations, the Presiding
17 Officer issued an oral ruling as formalized in this order.

21 **Burden of Proof**

22 After the Board has entered a finding of noncompliance, the local jurisdiction is given
23 a period of time to adopt legislation to achieve compliance.⁴ After the period for compliance
24 has expired, the Board is required to hold a hearing to determine whether the local
25 jurisdiction has achieved compliance.⁵ For purposes of Board review of the comprehensive
26 plans and development regulations adopted by local governments in response to a
27 noncompliance finding, the presumption of validity applies and the burden is on the
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31 ³ Identified in these proceedings as Legal Issue 6 – Logical Outer Boundaries (LOB) – *Smith & Guide Meridian*
32 and Legal Issue 7 – Logical Outer Boundaries – *Birch Bay/Lynden & Valley View*.

⁴ RCW 36.70A.300(3)(b).

⁵ RCW 36.70A.330(1) and (2).

1 challenger to establish that the new adoption is clearly erroneous in view of the entire record
2 before the board and in light of the goals and requirements of the GMA.⁶

3 In order to find the County's action clearly erroneous, the Board must be "left with the
4 firm and definite conviction that a mistake has been made."⁷

5 Within the framework of state goals and requirements, the Board must grant
6 deference to local governments in how they plan for growth⁸

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8 In sum, during compliance proceedings the burden remains on the Petitioner to
9 overcome the presumption of validity and demonstrate that any action taken by the County
10 is clearly erroneous in light of the goals and requirements of chapter 36.70A RCW (the
11 Growth Management Act).⁹ Where not clearly erroneous and thus within the framework of
12 state goals and requirements, the planning choices of the local government must be granted
13 deference.

14 Petitioner Futurewise asserts in its brief that "the burden is initially on the County" as
15 to compliance.¹⁰ The Board disagrees and finds no support in the GMA for this assertion.
16 Under RCW 36.70A.320(4), a county "subject to a determination of invalidity made under
17 RCW 36.70A.300 or 36.70A.302 has the burden of demonstrating that the ordinance or
18 resolution it has enacted in response to the determination of invalidity will no longer
19 substantially interfere with the fulfillment of the goals of" the GMA. The County's burden
20 under RCW 36.70A.320(4) is limited to invalidity determinations under the standard in RCW
21 36.70A.302(1), and this burden of the County does not apply to compliance determinations.
22 As to compliance, the burden is always on the Petitioner to overcome the presumption of
23 validity and demonstrate that any action taken by the County in an attempt to achieve
24 compliance is clearly erroneous in light of the goals and requirements of the GMA.
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30 ⁶ RCW 36.70A.320(1), (2), and (3).

31 ⁷ *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

32 ⁸ RCW 36.70A.320(1).

⁹ RCW 36.70A.320(2).

¹⁰ Futurewise's Concurrence with a Finding of Compliance in Part and Objection to a Finding of Compliance in Part (September 19, 2013), pp. 2, 15-16.

1 **Applicable Rule**

2 RCW 36.70A.270(7) requires the Board to “develop and adopt rules of practice and
3 procedure” and specifies that the Administrative Procedure Act, RCW Chapter 34.05, “shall
4 govern the practice and procedure of the board.”¹¹

5 In the context of adjudicative proceedings, RCW 34.05.467 provides:

6 A party may submit to the presiding or reviewing officer, as is appropriate to
7 the stage of the proceeding, a petition for stay of effectiveness of a final
8 order within ten days of its service unless otherwise provided by statute or
9 stated in the final order. Disposition of the petition for stay shall be made by
10 the presiding officer, reviewing officer, or agency head as provided by
11 agency rule. Disposition may be made either before or after the effective
12 date of the final order. Disposition denying a stay is not subject to judicial
review.

13 In the context of judicial review of agency action, RCW 34.05.550(1) provides:

14 Unless precluded by law, the agency may grant a stay, in whole or in part,
15 or other temporary remedy.

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17 The Board’s administrative code WAC Chapter 242-03 governs procedures and
18 practice of the Board. WAC 242-03-860 governs motions for stay of compliance
19 proceedings when the Board’s order finding noncompliance has been appealed to court.¹²
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22 ¹¹ RCW 36.70A.270 Conduct, procedure, and compensation

23 (7) All proceedings before the board, any of its members, or a hearing examiner appointed by the board
24 shall be conducted in accordance with such administrative rules of practice and procedure as the board
25 prescribes. The board shall develop and adopt rules of practice and procedure, including rules regarding
26 expeditious and summary disposition of appeals and the assignment of cases to regional panels. The board
27 shall publish such rules and decisions it renders and arrange for the reasonable distribution of the rules and
28 decisions. Except as it conflicts with specific provisions of this chapter, the administrative procedure act,
chapter 34.05 RCW, and specifically including the provisions of RCW 34.05.455 governing ex parte
communications, shall govern the practice and procedure of the board.

29 ¹² WAC 242-03-860 Stay.

30 The presiding officer pursuant to RCW 34.05.467 or the board pursuant to RCW 34.05.550(1) may stay the
effectiveness of a final order upon motion for stay filed within ten days of filing an appeal to a reviewing court.
A stay may be granted if the presiding officer or board finds:

31 (1) An appeal is pending in court, the outcome of which may render the case moot; and

32 (2) Delay in application of the board’s order will not substantially harm the interest of other parties to the
proceedings; and

(3)(a) Delay in application of the board’s order is not likely to result in actions that substantially interfere with
the goals of the GMA, including the goals and policies of the Shorelines Management Act; or

1 The rule provides a motion for stay should be filed within ten days of filing an appeal to a
2 reviewing court. WAC 242-03-860 (preamble). A stay may be granted if the Board finds
3 “[a]n appeal is pending in court, the outcome of which may render the case moot.” WAC
4 242-03-860(1). Grant of stay also requires a finding that delay of compliance “is not likely to
5 result in actions that substantially interfere with the goals of the GMA” or implementation of
6 the noncompliant ordinance has been halted and “no irreversible action regarding the
7 subject matter of the case” will be undertaken during pendency of the stay. WAC 242-03-
8 860(3).
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10 11 **LAMIRD DRs**

12 Whatcom County appealed the Board’s January 4, 2013, ruling finding its LAMIRD
13 DRs noncompliant to superior court on February 1, 2013. The County acknowledges it has
14 not amended its LAMIRD regulations found noncompliant and invalid by the Board. **The**
15 **Board finds** Whatcom County is in **continuing noncompliance** as to its LAMIRD DRs.
16 The Board makes a determination of continuing **invalidity**.¹³
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18 The request for stay of compliance proceedings was first raised in the concluding
19 paragraph of the County’s response to objections filed September 26, 2013,¹⁴ after the
20 parties had completed their briefs and submissions for the compliance hearing. The motion
21 was filed October 15, 2013. **The Board finds** the motion for stay as to LAMIRD DRs was
22 not filed within ten days of filing an appeal to a reviewing court.
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24 However, the Board agrees with the County that the other criteria of the rule are
25 satisfied. The Board’s January 4, 2013, Compliance Order made a determination of
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27 (b) The parties have agreed to halt implementation of the noncompliant ordinance and undertake no
28 irreversible actions regarding the subject matter of the case during the pendency of the stay; and
29 (4) Delay in application of the board’s order furthers the orderly administration of justice.
30 The board’s order granting a stay will contain appropriate findings and conditions. A board order denying stay
is not subject to judicial review.

31 ¹³ RCW 36.70A.320(4) places the burden on a “a county or city subject to an order of invalidity” to
32 “demonstrat[e] that the ordinance it has enacted in response to the determination of invalidity will no longer
substantially interfere with the goals of the [GMA].” Here the County has simply taken no action to cure the
noncompliance.

¹⁴ Whatcom County’s Response to Objection to a Finding of Compliance, p. 18.

1 invalidity as to the LAMIRD DRs.¹⁵ Thus the noncompliant regulations cannot be
2 implemented during the pendency of any appeal. While the petitioners object that they have
3 briefed these matters and deserve to have them heard, the Board observes that their
4 preparation is not wasted but may be used in the superior court proceedings.

5 Pursuant to WAC 242-03-860, **the Board finds:**

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- 7 • An appeal to court on this issue is pending, and the court's decision may resolve
8 the issue.
 - 9 • Due to the continuing order of invalidity, delay in compliance by the County will
10 not substantially harm petitioners.
 - 11 • Due to continuing invalidity, delay in compliance is not likely to result in actions
12 that substantially interfere with the goals of the GMA.
 - 13 • Because of the continuing determination of invalidity, the implementation of the
14 noncompliant ordinances has been halted and no irreversible action concerning
15 the LAMIRD DRs is likely during the pendency of the stay.
 - 16 • Delay in application of the Board's order furthers the orderly administration of
17 justice.
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19 The Board therefore enters an order finding continuing noncompliance, a continuing
20 determination of invalidity, and granting the motion for stay of the compliance deadline as to
21 LAMIRD DRs.
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23 **LAMIRD LOBs**

24 Whatcom County did not appeal the Board's January 4, 2013, ruling finding its
25 LAMIRD LOBs for Smith/Guide Meridian and Birch Bay/Lynden noncompliant and invalid.
26 However, the County acknowledges it has not amended these LAMIRD LOBs. The County
27 states it determined not to comply with the Board's order because landowners Boulos (Birch
28 Bay) and Pullar (Smith/Guide Meridian) filed appeals on these issues in superior court.¹⁶
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31 ¹⁵ Compliance Order (January 4, 2013), pp. 88-93.

32 ¹⁶ Boulos and Pullar filed appeals of the Board's January 4, 2013, Compliance Order in Superior Court
February 1, 2013. Whatcom County Superior Court Cases No. 13-2-00286-4 and 13-2-00289-9. They

1 **The Board finds** Whatcom County is in **continuing noncompliance** as to its LAMIRD
2 LOBs. The Board finds that the **determination of invalidity issued on January 4, 2013,**
3 **continues in full force and effect.**

4 Boulos and Pullar as Intervenors filed briefs and affidavits on the merits with respect
5 to the logical outer boundaries of the LAMIRDs at issue. However, the Board determined
6 that Whatcom County has taken no action in the Ordinances now before the Board to adopt
7 or amend its comprehensive plan or development regulations concerning the boundaries of
8 the two LAMIRDs. The Board's jurisdiction is strictly limited by statute. The Board hears
9 only petitions challenging GMA compliance of plans, regulations and amendments thereto
10 **adopted** by a local government.¹⁷ Whatcom County has not amended its LAMIRD
11 boundaries in the ordinances it has adopted and which are before the Board in this
12 compliance proceeding. Thus there is no County action upon which the Board can base
13 authority to consider the Intervenors' evidence or arguments. The Board therefore
14 disregards the Intervenors' submissions and will not address their motion for stay of
15 compliance proceedings. **The Board finds and concludes it lacks authority to address**
16 **LAMIRD LOB issues raised by Intervenors.**

17 The request for stay of compliance proceedings regarding LAMIRD LOBs was first
18 raised in the concluding paragraph of the County's response to objections filed September
19 26, 2013, after the parties had completed their briefs and submissions for the compliance
20 hearing. The motion was filed October 15, 2013. **The Board finds** the motion for stay as to
21 LAMIRD LOBs was not filed within ten days of filing an appeal to a reviewing court.

22 However, the Board agrees with the County that the other criteria of the rule are
23 satisfied. On January 4, 2013, the Board made a determination of invalidity as to the LOBs
24 for these two LAMIRDs. Thus the noncompliant LAMIRDs cannot be developed during the
25 pendency of any appeal. While the petitioners object that they have briefed these matters
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32 subsequently sought and were granted intervention in the Board's current compliance proceedings. Order
Granting Intervention (July 17, 2013).

¹⁷ See RCW 36.70A.280(1)(a); RCW 36.70A.290(2); RCW 36.70A.300(1).

1 and deserve to have them heard, the Board observes that their preparation is not wasted
2 but may be used in the superior court proceedings.

3 Pursuant to WAC 242-03-860, **the Board finds:**

- 4 • Appeals to court on these issues are pending, and the court's decision may
5 resolve the issue.
- 6 • Due to the continuing order of invalidity, delay in compliance by the County will
7 not substantially harm petitioners.
- 8 • Due to continuing invalidity, delay in compliance is not likely to result in actions
9 that substantially interfere with the goals of the GMA.
- 10 • Because of the continuing determination of invalidity, the implementation of the
11 noncompliant ordinances has been halted and no irreversible action concerning
12 the LAMIRD LOBs is likely during the pendency of the stay.
- 13 • Delay in application of the Board's order furthers the orderly administration of
14 justice.

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17 The Board therefore enters an order finding continuing noncompliance, a continuing
18 determination of invalidity, and granting the motion for stay of the compliance deadline as to
19 LAMIRD LOBs.
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21 ORDER

22 The Board finds Whatcom County has not taken action to achieve compliance with
23 the Board's January 4, 2013, Compliance Order concerning:
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- 25 • LAMIRD DRs - Legal Issue 5 – Type I, II and III LAMIRDs "Exemptions" and
26 "Small Scale Standards," and
- 27 • LAMIRD LOBs - Legal Issue 6 – Logical Outer Boundaries (LOB) – *Smith & Guide*
28 *Meridian* and Legal Issue 7 – Logical Outer Boundaries – *Birch Bay/Lynden &*
29 *Valley View*.

30 The Board finds and concludes the following: the finding of noncompliance issued on
31 January 4, 2013, continues in full force and effect, and the determination of invalidity issued
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1 on January 4, 2013, continues in full force and effect concerning these three issues. This
2 order shall remain in effect until the County takes compliant action or the issues are
3 resolved by a final ruling of the court.

4 The Board grants a stay of the compliance schedule for the County's compliance
5 actions concerning LAMIRD DRs and LAMIRD LOBs pending final determination by the
6 court.
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8 Entered this 8th day of November, 2013.
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12 Nina Carter, Board Member
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14 _____
15 Margaret Pageler, Board Member
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18 Raymond Paolella, Board Member
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